

<b>STATE OF SOUTH CAROLINA</b>	)	<b>BEFORE THE CHIEF PROCUREMENT</b>
<b>COUNTY OF RICHLAND</b>	)	<b>OFFICER FOR CONSTRUCTION</b>
	)	
	)	
<b>IN THE MATTER OF: COMPLEX FOR</b>	)	<b>WRITTEN DETERMINATION</b>
<b>INDUSTRIAL AND ECONOMIC</b>	)	
<b>DEVELOPMENT-PHASE III</b>	)	
	)	
<b>STATE PROJECT H59-9851-PG</b>	)	<b>POSTING DATE: October 15, 2003</b>
	)	
<b>TRIDENT TECHNICAL COLLEGE</b>	)	
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This matter is before the Chief Procurement Officer for Construction ("CPOC") pursuant to a request from Trident Technical College (TTC) for the cancellation of the award of the design contract for the Complex For Industrial And Economic Development – Phase III project ("Project"). This request, dated July 16, 2003 is attached to and is hereby made a part of this determination. Although not specifically cited in TTC's request, any request for the cancellation of an awarded contract, prior to performance is governed by §11-35-1520(7) of the South Carolina Consolidated Procurement Code ("Code") and Regulation 19-445.2085(C). This regulation establishes eight grounds that may be cited in the CPOC's determination. In its request for cancellation TTC did not cite, specifically, any of the eight grounds stated in the regulation.

### **DISCUSSION**

As alluded to in TTC's request for cancellation, this matter initially came before the CPOC as a request from Glick/Boehm & Associates, Inc., Rosenblum Coe & Associates, Goff D'Antonio Associates and McKellar Associates, Inc. (collectively, "Protestants"), under the provisions of §11-35-4210 of the Code, for an administrative review of the award of the prime design services contract for the Project. Due to the importance of this issue and its implications to the integrity of the public procurement process, the CPOC commissioned [Exh. 1, Att. 4] an investigation by a senior member of the OSE staff, whose report is part of the record of this Determination [Exh. 1]. This investigation revealed serious and substantial issues, which in the opinion of the CPOC merited a formal hearing, now deferred pending final resolution of TTC's request for cancellation. These issues are discussed below.

## **BACKGROUND**

Pursuant to the requirements of §11-35-3220 of the Code, TTC issued an invitation for qualified architect/engineers (A/E's) to submit their qualifications to provide design and construction phase services for the Project. The responses were evaluated and the firm of LS3P Associates, Ltd. ("LS3P") was selected for negotiation. The Protestants challenged the selection, alleging a conflict of interest related to Frank E. Lucas ("Lucas"), who was serving both as a member of Trident's Foundation Board (TTF) and also as Chairman of LS3P. Protestants sought to have LS3P disqualified and the contract awarded to the firm initially ranked second by the Agency Selection Committee. [Exh. 1, Att. 1]

The Complex for Industrial and Economic Development is a large project whose basic scope is the renovation and conversion of an existing industrial building to meet the programmatic needs of TTC. [Exh. 1, tab 6] It has been implemented in three phases. The first phase (State Project H59-N132-BW), was a conceptual study awarded to LS3P on June 12, 1997 for \$16,000 as a "small A/E contract."<sup>1</sup> [Exh 1, Att. 9] The scope of the study and the contract deliverable as proposed by LS3P was:

*...a program document setting forth the details and requirements for the facility. The program will elaborate the space and functional needs of the project...we will prepare floor plans, site plan, elevations and perspective drawings of the project, both interior and exterior. We will also provide a budget estimate for your use.*

Work on the study was apparently completed in late 1997. [Exh. 1, Att. 10] There is some question as to whether TTC ever paid LS3P for its services on this study. [Exh. 1, Tab 3 and Att. 10]. Lucas himself characterizes this effort as a "gift-in-kind." [Exh. 1, Tab 6] Gifts-in-kind of A/E services are allowed by the S.C. Code of Laws (§11-35-475 and §2-47-56), with specific procedural restrictions and public approval requirements. TTC's compliance with the statutory requirements for the acceptance of a gift-in-kind remains an open question.<sup>2</sup>

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<sup>1</sup> Contracts for A/E services valued at less than \$25,000 are awarded without public advertisement and on the basis of a limited set of evaluation factors with fees set by direct negotiation. See §11-35-3230 of the Code. These contracts are essentially non-competitive awards and can raise the issue of an organizational conflict of interest.

<sup>2</sup> The CPOC notes that State Regulation 11-12A(1), Code of Professional Ethics [for Architects] requires that: "*When conditions of compensation are submitted in a proposal for a study, pre-design, or preliminary design service, where future opportunity for additional work on the project is also available to the offeror, such conditions must be consistent and representative of the real cost of services to be performed*", and may be relevant to these circumstances, but consistent with the Panel's ruling in the case of *In re: Protest of First Sun EAP Alliance, Inc.; Appeal by First Sun EAP Alliance, Inc.*, Case 1994-11, the CPOC lacks

Phase II of the renovation (State Project H59-9783-PG) was formally authorized on September 15, 1999. [Exh. 2], and advertised for A/E selection on September 27, 1999 [Exh. 3]. The scope of the Phase II work was the conversion of some 122,000 square feet of the building into laboratories and teaching spaces. Whether the results of the Phase I study were provided to prospective A/E respondents remains an open question, but when Mr. Manseau<sup>3</sup> was questioned, he stated to be best of his recollection, it was not. Whether the product of the Phase I study and the knowledge gained in its preparation was of material benefit to LS3P in the Phase II selection remains an open question.<sup>4</sup>

Interviews were held January 24, 2000 and LS3P was selected for contract negotiation, without protest. A contract for Phase II design services was approved on May 1, 2000. [Exh. 4] Lucas' position as a member of the TTF Board was unknown to OSE at this time. [Exh. 1, Tab 2] On December 7, 2000 the President of TTC met with the TTF Executive Committee to request TTF provide financial support for the Phase II project. On February 6, 2001 the TTF Board voted to provide \$5 million for the Phase II work. Lucas was not a member of the Executive Committee and did not attend the February 6<sup>th</sup> meeting of the TTF Board.

Phase III of the renovation effort (the current Project) was authorized as a separate project on August 13, 2002, [Exh. 1, Tab 6] after the assigned OSE Project Manager had denied Trident's request to expand the scope of the on-going Phase II design and construction contracts to include this work.

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"...jurisdiction to determine ethical violations of standards set out by an accrediting or licensing association of a profession." Lacking jurisdiction to address such issues, the CPOC nonetheless maintains that it is improper for design professionals to offer, give, solicit or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect of intent to influence the awarding of a contract. Put simply, design professionals should not offer any gift or other valuable consideration in order to secure work.

<sup>3</sup> Mr. Manseau was the TTC Project Manager responsible for the Phase II work at the time of the A/E selection.

<sup>4</sup> See Decision of the Comptroller General, *In re: SSR Engineers, Inc.*, B-282244, June 18, 1999, applying FAR §9.505-2(b)(1). (Engineer excluded from participating in a procurement where Engineer had an organizational conflict of interest arising from its preparation of the statement of work and cost estimates used by the agency in the procurement). (copy attached)

## ANALYSIS

The essential issue raised by the unprecedented protest<sup>5</sup> is one of an actual or perceived conflict of interest created by Lucas' membership on the Board of TTF, at the same time Lucas's firm, LS3P, sought work from TTC<sup>6</sup>. As noted above, other questions related to prior dealings arose during the CPOC's review of the matter. Conflict of interest is the subject of numerous laws, regulations, court decisions and agency policy statements<sup>7</sup>. With no intent to establish a litmus test, the CPOC nevertheless feels it is appropriate to review the subject in general as it may apply to the personal and professional decisions of those who choose to be involved in the public's business.

Conflicts of interest may be personal or organizational. While it is important to acknowledge that conflicts of interest of whatever stripe are real and must be addressed, it is equally important to recognize what a conflict of interest is NOT. A conflict of interest is not:

- 1) A presumption of a bad motive; or,
- 2) An assumption of dishonesty; or,
- 3) A reflection of personal animosity.

A personal conflict of interest, either real or apparent,<sup>8</sup> may take many forms, but typically arises when a "public member" (see definition below), in relationship to an outside organization, is in a position to influence the business or other decisions of a state agency in ways that could lead directly or indirectly to financial gain for the member or a family member or business with which the public member is associated, or give improper advantage to others to the detriment of the agency. Put more directly, a person cannot serve two masters and thereby present the potential of

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<sup>5</sup> The CPOC is unaware of any protest filed in the 20+ year history of the Code related to a conflict of interest in an A/E selection. The CPOC is also unaware of any protest of an A/E selection process in which all of the lower-ranked firms protested the result.

<sup>6</sup> Lucas' involvement in his firm's solicitation effort was far more than passive ownership. Lucas actively led his firm's presentation of its qualifications in its oral interviews with Trident for both the Phase II and Phase III solicitations.

<sup>7</sup> See, for example, 18 U.S.C §§201-209; 5 C.F.R Part 2635, Subparts D, E, F; FAR 9.505; 107 U. Pa. L. Rev. 985; and *In re Oracle Corp. Derivative Litigation*, 824 A.2d 917 (Del.Ch. 2003).

<sup>8</sup> An "apparent conflict of interest" (sometimes referred to as an "appearance of impropriety") arises when a reasonable person, in full possession of the relevant facts, would conclude that either an actual conflict exists or impartiality in decision-making is compromised. This reflects a fundamental tenet of democracies—"justice must not only be done, it must be seen to be done", so the appearance is as bad as the actuality..

wrongdoing. Again, the CPOC notes that the wrongdoing does not have to occur for a conflict to exist.

An organizational conflict of interest, either real or apparent, may arise when a relationship or situation exists whereby an offeror, subcontractor or consultant has past, present or currently planned personal, financial, contractual, organizational or other interests that either directly or indirectly may:

- 1) diminish the consultant's ability to give impartial, objective assistance to the State; or,
- 2) result in the consultant being given an unfair competitive advantage by virtue of its access to non-public State information regarding the State's program plans and actual or anticipated resources.

These are not nebulous platitudes. The call to a higher standard of conduct is what distinguishes the professions of law, medicine, accountancy, architecture and engineering from other occupations.<sup>9, 10</sup>

*A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure examination, **a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace**, a system for discipline of its member for violation of the code of ethics, **a duty to subordinate financial reward to social responsibility**, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.***[emphasis added]**

When looking more directly at applicable South Carolina law, the bounds of acceptable conduct by agencies and by those who engage themselves in public procurement are set, in part, by the

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<sup>9</sup> In re: Estate of Julius Freeman, 355 N.Y. S.2d 336 (1974).

<sup>10</sup> The Code of Ethics of the American Institute of Architects includes Ethical Standard 3.2, Conflict of Interest, which states: "Members should avoid conflicts of interest in their professional practices and fully disclose all unavoidable conflicts as they arise." The standard is amplified by Rule 3.201, which states: "A Member shall not render professional services if the Member's professional judgment could be affected by responsibilities to another project or person, or by the Member's own interests, unless all those who rely on the Member's judgment consent after full disclosure." Similarly, but with greater specificity, the Code of Ethics of the National Society of Professional Engineers includes Rule of Practice 4, which requires that "Engineers shall act for each employer or client as faithful agents or trustees." This rule includes several specific requirements relevant to this case: "a. Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services;...d. Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice; e. Engineers shall not solicit or accept a

Consolidated Procurement Code<sup>11</sup>. The underlying purposes and policies of the Code are defined in §11-35-20, to wit:

(a) *...that procurements...[be] in compliance with the provisions of the Ethics, Government Accountability, and Campaign Reform Act [hereafter Ethics Act]...*

(f) *to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote public confidence in the procedures followed in public procurement;*

(g) *to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of **all persons engaged in the public procurement process**...*[Emphasis added]

Section 8-13-100(17) of the Ethics Act defines a "governmental entity" as follows:

*(17) "Governmental entity" means the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed. "Governmental entity" also means any charitable organization or foundation, but not an athletic organization or athletic foundation which is associated with a state educational institution and which is organized to raise funds for the academic, educational, research, or building programs of a college or university.*

Further, §8-13-100(26) of the Ethics Act defines a "public member" as follows:

*"Public member" means an individual appointed to a non-compensated part-time position on a board, commission, or council.*

An informal opinion by the State Ethics Commission dated October 10, 2003, states that "...members of a state college foundation's governing board are public members if they are appointed to a non-compensated part-time position on the board. The state college foundation is a governmental entity and the Ethics Reform Act's rules of conduct apply to the governmental entity."<sup>12</sup>

The Procurement Code does not define the limits of "...all persons engaged in the public procurement process..." as used in §11-35-20(g), but the CPOC believes it clearly includes those

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contract from a governmental body on which a principal or officer of their organization serves as a member."

<sup>11</sup> Laws and rules such as those contained in the provisions of the Procurement Code and Ethics Act establish minimal standards and arbitrary rules of behavior to safeguard public assets and to prevent the abuse of the public trust. Ethical conduct is not about legal behavior, it concerns our character and courage and how we meet the challenge of doing the right thing, even when doing so will cost more than we would otherwise like to pay. Ethics requires us to abandon the notion that an act is proper simply because it is permissible, or is ethical so long as it is legal. Ethical behavior is not a matter of code, it is a matter of conscience.

<sup>12</sup> A copy of the opinion is attached and hereby made a part of this Determination.

seeking state contracts as well as those involved in the selection and award process<sup>13</sup>. In addition, §11-35-40(4) of the Code explicitly addresses foundations and other eleemosynary groups such as TTF, and requires construction projects jointly funded by foundations and the State to be conducted in complete accordance with the provisions of the Code.

It is the conclusion of the CPOC that the actions of the TTF Board and its members clearly fall within the ambit of the provisions of the Consolidated Procurement Code and the Ethics Act with respect to their respective provisions related to conflicts of interest and appearances of impropriety<sup>14</sup>.

The Preamble to the Ethics Act clearly states the expectations imposed on public servants, to wit:

*Whereas, one of the most important functions of any law aimed at making public servants more accountable is that of complete and effective disclosure. Since many public officials serve on a part-time basis, it is inevitable that conflicts of interest and appearances of impropriety will occur. Often these conflicts are unintentional and slight, but at every turn those who represent the people of this State must be certain that it is the interests of the people, and not their own, that are being served.<sup>15</sup> Officials should be prepared to remove themselves immediately from a decision, vote, **or process that even appears to be a conflict of interest.** [emphasis added]*

More specifically, §8-13-700 states in relevant part:

*(A) No ...public member...may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated...*

*(B) No...public member...may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A...public member...who, in the discharge of his official responsibilities, is required to take an action or make a decision which*

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<sup>13</sup> The CPOC notes that §8-13-1150 of the Ethics Act includes architects and engineers within the scope of Consultants whose special relationship and responsibilities may require them to file Statements of Economic Interests.

<sup>14</sup> This is consistent with the Panel's *First Sun EAP* decision that held the Panel has jurisdiction to consider the "obligation of good faith" as it relates to the procurement process, under §11-35-30. Inherent in "good faith" conduct is ethical conduct.

<sup>15</sup> Laws and rules such as those contained in the provisions of the Ethics Act establish minimum standards and arbitrary rules of behavior to safeguard public assets and to prevent the abuse of the public trust. But the CPOC maintains that ethical conduct is more than minimally legal behavior; ethical conduct challenges our character and courage to do the right thing, even when doing so will cost us more than we would otherwise like to pay. Ethics requires us to abandon the notion that an act is proper simply because it is permissible, or is ethical so long as it is legal.

*affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:*

*(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;...*

*(5) if he is a public member, he shall furnish a copy to the presiding officer of any agency, commission, board...on which he serves, who shall cause the statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause such disqualification and the reasons for it to be noted in the minutes.*

Whether Lucas and TTF complied with the provisions of the Ethics Act with respect to disclosure and disqualification with respect to any phase of the overall project remains an open question.

Public members are constrained in their use of information gained in the course of their public service. Specifically, §8-13-725(A) of the Ethics Act limits the use or disclosure of confidential information by a public member for financial gain, to wit:

*(A) A ...public member...may not use or disclose confidential information gained in the course of or by reason of his official responsibilities in a way that would affect an economic interest held by him, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.*

Whether LS3P's performance of the Phase I planning study resulted in its possession of confidential information that unfairly disadvantaged the competitors for the Phase II design remains an open question.

The Ethics Act also defines the permissible limits of a public member's involvement in a contract with the State. Section 8-13-775 of the Ethics Act states in relevant part:

*A public...member...may not have an economic interest in a contract with the State or its political subdivisions if the public official, public member, or public employee is authorized to perform an official function relating to the contract. Official function means writing or preparing the contract specifications, acceptance of bids, award of the contract, or other action on the preparation or award of the contract. This section is not intended to infringe on or prohibit public employment contracts with this State or a political subdivision of this State nor does it prohibit the award of contracts awarded through a process of*

*public notice and competitive bids if the public official, public member, or public employee has not performed an official function regarding the contract.*<sup>16</sup>

As with an individual, a firm<sup>17</sup> may not serve two masters. The reality of organizational conflict of interest is addressed in §11-35-3245 of the Code, wherein A/Es and construction managers are, under certain circumstances, forbidden to perform the construction work<sup>18</sup> of a project for which they have design or construction management responsibilities. While not all-inclusive, some additional examples where an organizational conflict of interest may arise, and must be addressed and mitigated, include:

- 1) The A/E's services involve the preparation and furnishing of complete or essentially complete specifications which are to be used in the competitive acquisition of products or services. The primary concern in this case is that an A/E so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competitors.
- 2) The A/E's services involve the preparation and furnishing of a detailed plan for specific approaches or methodologies that are to be incorporated in a competitive acquisition. Again, the primary concern in this case is that an A/E so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competitors.
- 3) The A/E's services involve access to internal information not available to the public concerning agency plans or programs and related opinions, clarifications, interpretations, and positions. Such an advantage could easily be perceived as unfair by a competitor who is not given similar access to the relevant information.
- 4) The A/E's services involve either self-assessment, or the assessment of another business division or a subsidiary of the same corporation, or of another entity with which it has a significant financial relationship. The concern in this case is that the A/E's ability to render impartial advice to the agency could appear to be undermined by the contractor's financial or other business relationship to the entity whose work product is being assessed or evaluated.

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<sup>16</sup> The CPOC notes that in SEC98-010, the Ethics Commission ruled that a public servant (mayor) could not seek a contract from a city because he was a member of the Council, regardless of whether he recused himself in accordance with §8-13-700(B).

<sup>17</sup> In regard to the question of application of the Code and the Ethics Act to corporations vis-à-vis real persons, the business form or type should not negate nor influence conformance of individuals to the Code or the Ethics Act. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

<sup>18</sup> Either directly or through a business in which he has greater than 5% interest.

As discussed more fully below, the nature of A/E contracting is unique to the Code. Once selected for negotiation, the A/E is fully involved with the agency in defining the scope of services to be provided by the A/E, the fee to be paid to the A/E for those services and the acceptability of the end product.<sup>19</sup> Thus, the A/E is, by virtue of the mandated selection process, inextricably involved in the process of defining its own contract.<sup>20</sup> To the extent possible, the selection and negotiation process must be at arm's length. Any A/E who, by virtue of its prior involvement in the activities of the agency (or its closely affiliated support groups) is in a position of superior knowledge of the agency's budget, its available or potential resources and other imperatives, all of which can be used to the advantage of the A/E firm and to the detriment of its competition. The CPOC believes the conflict of interest in these situations is not just apparent, but real, and must be affirmatively addressed by each agency and any affiliated groups to preserve and enhance public confidence in the agency's conduct.

The question naturally arises as to whether it is possible for a design professional, while serving as a member of the governing board of a governmental entity covered by the Code and the Ethics Act, to solicit contracts with the agency while acting in accordance with the requirements of the Code and the Ethics Act.<sup>21</sup> First, we must recognize that conflicts of interest and commitment are pervasive in professional life. Conflicting pressures inherent in seeking personal advancement; in obtaining commissions for signature projects; in winning the acclaim of one's professional peers; and in competing for prestigious awards all may be more powerful in influencing a professional's behavior than the prospect of material enrichment. These intellectual conflicts tend to be amorphous and are not of much concern to the public, but they are widely recognized within the design community. In contrast, financial conflicts tend to be discrete and quantifiable, but are often unrecognized until specifically disclosed. Moreover, financial conflicts are very well

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<sup>19</sup> A/E's are, by statute and contract, required to perform their services to a standard of care defined as "...the technical knowledge and skill which is ordinarily applied by architects and firms in good standing in South Carolina." [SC Regulation 11-13E(1)] This is a self-defined level of quality, which reinforces the CPOC's position that A/Es have a freedom of action and therefore a special duty to their clients not imposed on ordinary vendors.

<sup>20</sup> The CPOC notes that in 1995 the Legislature added the clauses excluding the public bidding process from the blanket prohibitions of §8-13-775, further distinguishing the sealed bidding process from other methods of contract award, such as the A/E selection process. While the CPOC is unaware of any Ethics Commission opinions directly addressing this issue, the CPOC believes a strong argument could be made that the selection process mandated by §11-35-3220 does not fall within the ambit of the §8-13-775 exemption for contracts awarded through a process of "competitive bids."

<sup>21</sup> Indeed, Lucas urged that the CPOC issue a decision [on the protest] finding no evidence of wrongdoing or undue influence on this particular solicitation, and then endorsing a call to state agencies and boards to adopt formal conflict of interest policies.

understood by the public and for this reason pose a special vulnerability and risk to the public procurement process that demand special attention.

Second, it follows that although these conflicting pressures are diverse in origin and may be subtle, their oversight and management are primarily the responsibility of the State and its agencies. It is the State's responsibility to clearly set uniform standards and not leave agencies, individuals and firms to wonder what is acceptable.

Third, it also follows that since these conflicts can never be eradicated from professional life, their existence must be accepted and not equated with professional misconduct. This last point is very important and bears repeating: the simple presence of conflict of interest, real or apparent, does not equal professional misconduct. What matters is what is done in response to the conflict.

Fourth, both agencies and the design community must recognize that a design professional occupies a special niche in the Code, and thereby acquires special duties and limitations not imposed on the typical vendor. When a building project is initiated by a public agency, the selection of a qualified design professional is fundamental to fulfilling the agency's stewardship responsibilities. The quality of the A/E's work has an overwhelming impact on the ultimate success of any project, but these are even more important considering the typically long life and impact of most public structures. Critical issues of feasibility, fiscal accountability, design effectiveness, functional efficiency and life cycle costs all hinge upon the prudent, professional judgment of the selected A/E. The means of selecting reliable, professionally competent design professionals for service in the public interest is crucial and the State has a compelling interest in ensuring that a fair and equitable selection process is conducted in an open and ethical manner.<sup>22</sup> While professional design services may represent only a small percentage of the construction budget of any building, and an even smaller proportion of its total life cycle cost, it is in the best interest of the taxpayer to ensure only the most qualified individuals and firms are selected for the design of public facilities.

Section 11-35-3220 of the Code comprises what is referred to as a "Qualifications-Based Selection" (QBS) or "mini-Brooks Act" process<sup>23</sup> for the selection of A/Es and other design

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<sup>22</sup> The CPOC finds it telling that four highly respected design firms were motivated by the history of the entire project and the circumstances of this solicitation to protest the selection of LS3P.

<sup>23</sup> The Brooks Act (Public Law 92-582), which was enacted on October 18, 1972, establishes the procurement process by which architects and engineers (A/Es) are selected for design contracts with Federal design and construction agencies. The Brooks Act establishes a qualifications-based selection (QBS) process, in which contracts for A/Es are negotiated on the basis of demonstrated competence and

professionals. The American Bar Association Model Procurement Code for State and Local Government (2/79) specifies QBS as the preferred method of procuring services of design professionals.<sup>24</sup> In addition, some 40 states have adopted QBS as the method of selecting design professionals. South Carolina became one of those states in 1981 with the passage of the South Carolina Consolidated Procurement Code.

The CPOC notes, in response to concerns raised by some of the protestants, that the Code neither mandates nor prohibits the award of contracts subsequent to an initial award, **provided such awards are based on the merits of the proposers in fair and open competition.** To encourage quality services, there can be the "prospect", but not the "promise", of future work. The Code does not permit, except in very narrow circumstances, the automatic award of follow-on or renewal contracts to an incumbent. By implication, the Code requires that all applicants be evaluated in a way that makes no single factor, including existing or prior relationships, the defining feature of an application for future work.

The CPOC notes that the qualifications-based selection process for design professional services as mandated in the Code is highly subjective and unique in its unstated reliance on the trust of all involved. In particular,

- The members of the design community must have confidence that they will be afforded a full, fair and open opportunity to present their qualifications for an impartial and complete evaluation by a committee actively involved and engaged in the entire selection process, all as required by the Code, and without hidden agendas.
- The members of the Agency Selection Committee must have confidence that those presenting their qualifications do so with the intent of demonstrating their superior qualifications to perform the work; that their fellow Committee members will perform the impartial and complete evaluation required to identify the most highly qualified firm; and that the firm selected has no other interest that would hinder or distract the firm from the

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qualification for the type of professional services required at a fair and reasonable price. Under QBS procurement procedures, price quotations are not a consideration in the selection process.

<sup>24</sup> In its commentary, the ABA states "The principal reasons supporting this selection procedure for architect, engineer and land surveying services are the lack of a definitive scope of work for such services at the time the selection is made, and the importance of selecting the best qualified firm. In general, the architect, engineer or land surveyor is engaged to represent the (state's) interest and is, therefore, in a different relationship with the (state) from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the most qualified architect, engineer or land surveyor firms is considered initially, and price negotiated later."

performance of its job—or that would appear to influence its judgment or affect its commitment to achieving the agency's goals.

- Finally, and most importantly, the public must have confidence that this ill-understood and often-criticized QBS process will result in a contract for A/E services awarded on the basis of demonstrated competence and qualification for the particular services required and at a fair and reasonable price. In order to cultivate legitimacy in the eyes of the public, it is necessary that the path to a public contract be visibly open to all talented and qualified firms and individuals. All members of our society must have confidence in the openness and integrity of the public agencies entrusted with a public mission and funds. All activities related to a procurement for A/E services, and those who are involved, must remain at arm's length. Anything less may constitute a real or apparent conflict of interest, both equally corrosive to public confidence in the integrity of the public procurement process. Public trust and confidence in government can be maintained only if the occasions for apparent conflict of interest are kept to a minimum. Public perception is paramount. The perception that government business is being conducted in an impartial and even-handed manner is essential to enhancing public confidence in the overall integrity of government.

For these reasons, if we are to continue to award design professional contracts solely on the basis of merit, the CPOC believes there must be clear and conservative guidelines regarding the solicitation of business from an agency and a firm's participation in the governance and support of those self-same agencies. Absent a specific set of facts, the CPOC declines to provide any further definition of those rules than the guidance provided herein. That is the duty of each agency.

The CPOC is not unaware that some design professionals may find the position enunciated in this Determination requires them to decide between their public and private interests, and the State may lose the services of motivated and talented individuals.<sup>25</sup> In response, it should be recognized that public service is exactly that—service—and is not an opportunity to further one's business interests. The CPOC also notes that this conflict appears most prevalent with institutions of higher education, of which there are some thirty-three in this State. A period of public service to one such agency in no way precludes an A/E from soliciting work from the others.

## **DECISION**

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<sup>25</sup> Lucas made it clear that he would decline to serve on the boards of agencies or their foundations if such service required him to forego the opportunity to seek work from those agencies.

It is the decision of the Chief Procurement Officer for Construction that in view of the discussion above, and given Trident Technical College's stated intent to solicit for design services for a larger project which will encompass the scope of the Phase III project, it is in the best interests of the State that the award of the contract for the design of the Complex for Industrial and Economic Development–Phase III to LS3P, Ltd. be cancelled pursuant to Regulation 19-445.2085(C)(8). Trident Technical College may proceed with the procurement of the required services in accordance with the Code.

**IT IS SO ORDERED**

A handwritten signature in black ink, reading "Michael M. Thomas". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

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Michael M. Thomas  
Chief Procurement Officer  
for Construction

October 15, 2003  
Date

## STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4410, subsection 1(b), states:

*(b) Requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures.*

Additional information regarding the protest process is available on the internet at the following web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

July 16, 2003

Mr. Michael M. Thomas, P.E.  
Chief Procurement and Officer for Construction  
State of South Carolina  
State Budget and Control Board  
Procurement Services Division  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201

RECEIVED  
JUL 18 2003  
OFFICE OF STATE ENGINEER

Dear Mr. Thomas,

In Re: Glick/Boehm et al Protest vs. Trident Technical College

Since I received your letter establishing a hearing date, I have spent an extraordinary amount of time thinking about how Trident Technical College should proceed in this matter. As you know, we had hoped to start on Phase III of the Complex in November of 2002 with completion of construction scheduled for August of 2004. So far, we have already lost nine months from our anticipated start date for Phase III.

Now, we are faced with the difficulty of scheduling a hearing sometime in the next month followed by the length of time it will take you to reach a final decision. Then, if you overturn TTC's decision we would have no recourse but to appeal to the Procurement Review Panel and if necessary beyond that, to the courts. Mr. Glick and the other architects who signed his protest accusing TTC and LS3P of conflicts of interest apparently feel the same intensity about this matter. So if the College does prevail, it seems logical to assume that the protesters would go to the same lengths to reach a favorable conclusion. Either way, we could be looking at another six to nine months before we are able to start Phase III, as it is currently established.

I have carefully weighed the cost in time and energy of just this first hearing. The numerous witnesses that you have called, plus other internal and external witnesses that the College and the other parties, would call, will require significant amounts of time and preparation prior to the hearing.

Additionally, if history is any guide, the hearing itself is likely to last several days, which are not usually scheduled consecutively, thus taking more time, particularly when there are seven parties in interest.

Regardless of the fact that I strongly believe the college's position would eventually prevail, I can not in good conscience require our employees, particularly those who would have to commit the additional time necessary to research and prepare information related to Phase I and Phase II, to expend the time and energy in that manner.

We would obviously present the position that any protest of Phase III could not legitimately consider facts related to Phase I or Phase II. However, it is also clear from your letter that we would be required to be prepared for you to "inquire into the facts surrounding Phase I, II and III" of the project. As you may know, Phase I began in February of 1995, Phase II began in March of 2000. Simply retrieving and reviewing the massive records involved is a mammoth task. The task is even greater in that it is not clear what the purpose or relevancy to the current protest that those records or facts would have or for what we should be prepared.

Also, I have looked at the timeframes for appeals to the Procurement Review Panel. Clearly, the resolution of the matter could be well into 2004 or even beyond, particularly when we take into account the potential necessity of going on to the courts. I have to accept that these extended and likely delays would not be in the best interest of TTC and the state of South Carolina.

Ironically, it is possible that we could reach a final resolution within months of the time we had thought we might be able to start the final 25,000 square feet (Phase IV) of the Complex renovation, or possibly even after that time. That stark realization convinced me the college should not go forward with Phase III in its current scope. It also became clear to me that we could face a similar situation where we could have a solicitation for another architect and construction company to begin work on Phase IV while the Phase III architect and construction company were still in the building.

It is not in the College's best interest to have two architects and two construction companies working inside this one building, especially after this protest. I do recognize that we should have appealed that decision back in August of 2002, when we were first advised by your office that we could not consider Phase III as a part of Phase II. That decision precluded us from using one architect and one construction company for Phase II and Phase III, which are side-by-side, under one roof, at one time. I sincerely regret that we failed to fully explain that decision to your satisfaction or in the alternative that we didn't appeal that decision at the time. I regret the time and energy our failure to do so has cost you and your staff. I do want to point out again that at least three of the four protesters mentioned during the selection process that the construction company should stay the same in Phase III as in Phase II. I still find it illogical that the protesting architects maintain that the construction company should remain the same but that the architects should not remain the same.

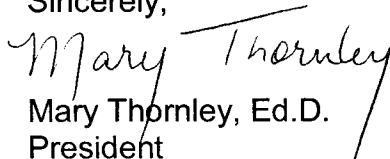
I do recognize what a unique and difficult situation this protest has presented due to the serious accusations the protesters have raised against TTC. I have grappled with my personal desire to see this matter through to the end to be certain that the College's process for choosing architects is recognized by the state as being fair and without conflict of interest. However, I have resigned myself to the fact that fighting this important battle could be enormously time consuming and energy draining.

Additionally, because of our enrollment increases, due in part to the lottery tuition assistance program, we require additional classroom space. Our growth has also hastened our decision to try to find funding to complete the rest of the complex. As we looked at the schedule we now face due to this protest, coupled with the current need for classrooms, I realized that folding both projects into one would be the most economic and efficient decision for the College and clearly in the best interest of the state.

Therefore, I am officially advising you of the College's request and intent to withdraw this project. Assuming your concurrence, we will issue a new solicitation which will encompass Phase III and Phase IV. We plan to do this after we have completed the approval process and after we have funding in place. This final renovation will finish the remaining 60,000 square feet of the Complex at one time.

Again, I regret the additional work and hardship this matter has caused your office. I appreciate your willingness to accommodate my personal schedule and the courtesy you have exhibited during this matter. I look forward to hearing from you.

Sincerely,

  
Mary Thornley, Ed.D.  
President

cc: Frank Lucas  
Keith McCook, Esq.  
Kaye L. Koonce, Esq.  
Neil C. Robinson, Jr., Esq.  
Myles Glick, Glick/Boehm & Associates  
Jeffery Rosenblum, Rosenblum Coe & Associates  
Garey Goff, Goff D'Antonio Associates  
Dot Brinson, McKellar Associates, Inc.



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**Comptroller General  
of the United States**

**Washington, D.C. 20548**

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## **Decision**

**Matter of:** SSR Engineers, Inc.

**File:** B-282244

**Date:** June 18, 1999

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Craig W. Jardine for the protester.  
Marilyn Walter Johnson, Esq., and Richard G. Welsh, Esq., Naval Facilities Engineering Command, Department of the Navy, for the agency.  
Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Agency reasonably excluded protester from participating in procurement where protester has an organizational conflict of interest arising from its preparation of the statement of work and cost estimates used by the agency in the procurement.

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### **DECISION**

SSR Engineers, Inc. protests the Department of the Navy's determination to exclude SSR from a procurement for changes to the electrical distribution system at Keesler Air Force Base, Biloxi, Mississippi, under request for proposals (RFP) No. N62467-99-R-0883, because of an organizational conflict of interest. The agency's determination is based on SSR's prior preparation of the statement of work and development of the cost estimates being used by the agency for the protested procurement.

We deny the protest.

The record shows that, in April 1996, SSR was awarded an architect-engineering services contract requiring that it "develop a long range comprehensive master plan to replace the overhead primary electrical, cable television, and Energy Management and Control System (EMCS) lines with new underground lines at Keesler AFB in Biloxi, Mississippi." Contract No. F22600-96-D-0010, Statement of Work § 2.1. The agency states that volume I of the three-volume master plan prepared by SSR under the prior contract is being used as the statement of work for the protested procurement, and that volume I also contains the cost calculations that are the basis for the agency's budgetary estimates.<sup>1</sup> Contracting Officer's Statement at 1, 3.

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<sup>1</sup> The cost estimates are being withheld from other offerors in the competition.

Volume II of the master plan, as described by SSR itself, "includes the power flow analysis, short circuit analysis, and coordination analysis for the proposed underground distribution system" and "contains printouts from the computer programs used to evaluate the distributions systems." Protester's Comments at 1. Volume III of the master plan reflects SSR's efforts to "develop generic specifications that would be given to an A/E firm as a guide for developing detailed construction specifications." Id.

On February 5, 1998, the agency's contracting officer advised SSR that, due to the conflict of interest created by SSR's work under the prior contract, SSR would not be permitted to participate in this procurement.<sup>2</sup> Subsequently, this protest was filed with our Office.

Subpart 9.5 of the FAR generally requires contracting officials to avoid, neutralize or mitigate potential significant organizational conflicts of interest, including precluding a particular firm from competing, so as to prevent unfair competitive advantages, the existence of conflicting roles that might impair a contractor's objectivity, or the existence of biased ground rules created, whether intentional or not, in situations where, for example, a firm writes the statement of work or specifications. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12; GIC Agric. Group, B-249065, Oct. 21, 1992, 92-2 CPD ¶ 263 at 6. Specifically, FAR § 9.505-2(b)(1) states:

If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services--or provides material leading directly, predictably, and without delay to such a work statement--that contractor may not supply the system, major components of the system or the services unless: (i) It is the sole source; (ii) It has participated in the development and design work; or (iii) more than one contractor has been involved in preparing the work statement.

The responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from competition rests with the procuring agency, and we will not overturn such a determination unless it is shown to be unreasonable. Ressler Assocs., Inc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230 at 2-3; LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531 at 4.

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<sup>2</sup> The agency asserts that SSR was notified of the determination earlier, on January 27, 1998. SSR denies that it was notified prior to February 5. SSR first filed an agency-level protest on February 8.

SSR does not dispute that it essentially prepared the statement of work and the cost estimates being used by the agency in this procurement. Further, SSR does not suggest that any of the exceptions contained in FAR § 9.505-2(b)(1), quoted above, are applicable here. Rather, SSR first argues that the conflict of interest provisions of FAR subpart 9.5 should not be applied because “FAR [§] 36.302 [which deals with construction and architect-engineer contracts] specifically addresses how the Government can utilize a consultant to develop a scope of work for a design-build project” and “[n]o where in [FAR] Part 36 does it state that the firm developing the scope [of work] is precluded from being part of a design-build team.” Agency-Level Protest, Feb. 25, 1999, at 2. SSR concludes that, “if the intent of the FAR[] was to preclude the firm developing the scope [of work] from participating on a design-build team the exclusions would be discussed or referenced in [FAR] Part 36.” Id.

We find without merit SSR’s assertion that the provisions of FAR subpart 9.5 are inapplicable to this procurement. FAR § 9.502(a) provides that, “[t]his subpart applies to contracts with either profit or nonprofit organizations,” and FAR § 9.502(b) further states that, “[t]he applicability of this subpart is not limited to any particular kind of acquisition.” Accordingly, the fact that FAR part 36 does not specifically address conflict of interest provisions in the context of construction and architect-engineer services contracts does not somehow render the organizational conflict of interest provisions of FAR subpart 9.5 inapplicable to such contracts.

SSR also complains that it has not obtained any competitive advantage based on its prior work. Specifically, while acknowledging that “[n]umerous contractors have expressed their desire to have SSR on their design/build team,” SSR asserts that “[c]ontractors are interested in using SSR on the Keesler AFB project not because of any competitive advantage, but because of the design capabilities SSR brings to the team.” Agency-Level Protest, Feb. 25, 1999, at 2. Additionally, while acknowledging that “SSR’s cost estimates established the ceiling for the budget cost,” SSR asserts that “[n]o established contractor . . . would rely on SSR to determine the pricing for labor and materials to construct the project.”<sup>3</sup> Protester’s Comments at 5. Finally, SSR maintains that it should be permitted to assist a prime contractor in preparing its proposal because SSR’s fees for such assistance would not constitute a major portion of the total contract cost, arguing that “[w]ith an insignificant share of the contract, the so called competitive advantage is also insignificant.” Protester’s Comments at 4-5.

Based on the record here, there is no basis to question the agency’s determination that, due to an organizational conflict of interest, SSR should be precluded from participating in this procurement. Specifically, on the basis of the undisputed facts

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<sup>3</sup> SSR also asserts, without explanation, that “[k]nowledge of the top price is a competitive disadvantage, not a competitive advantage.” Protester’s Comments at 5.

that SSR prepared material leading directly to the statement of work and prepared costs estimates which established the ceiling for the agency's budgeting of costs, we conclude that the agency reasonably determined that SSR's prior activities created an unfair competitive advantage as expressly contemplated by FAR subpart 9.5. SSR's assertions to the contrary provide no basis to object to the agency's determination.<sup>4</sup>

The protest is denied.

Comptroller General  
of the United States

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<sup>4</sup> SSR also protests that the Mississippi Power Company had access to the same type of information the agency has determined provides SSR with a competitive advantage, yet that company was permitted to participate in the procurement. The agency first notes that the Mississippi Power Company did not have access to the cost estimates created by SSR and that, while a sister corporation of Mississippi Power Company submitted an initial response to the solicitation, that firm "was not determined to be one of the most highly qualified and will not continue [in the procurement]." Affidavit of Technical Evaluation Board Chairman ¶ 7. Accordingly, there is no basis for further consideration of this portion of SSR's protest.

# State of South Carolina State Ethics Commission

COMMISSIONERS  
GREGORY P. HARRIS, MEMBER AT LARGE  
CHAIRMAN  
KENNETH C. KRAWCHECK, MEMBER AT LARGE  
VICE CHAIRMAN  
JESSAMINE D. GRIFFIN, 1<sup>ST</sup> DISTRICT  
L. EARLE BROWN, 2<sup>ND</sup> DISTRICT



COMMISSIONERS  
JOHN LEWIS CANNON, 3<sup>RD</sup> DISTRICT  
PETE G. DIAMADUROS, 4<sup>TH</sup> DISTRICT  
DUANE G. HANSEN, 5<sup>TH</sup> DISTRICT  
MARY T. WILLIAMS, 6<sup>TH</sup> DISTRICT  
FLYNN T. HARRELL, MEMBER AT LARGE

5000 THURMOND MALL, SUITE 250  
COLUMBIA, S.C. 29201

HERBERT R. HAYDEN, JR.  
EXECUTIVE DIRECTOR

October 10, 2003

Mr. Michael M. Thomas  
State Budget and Control Board  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201

Re: Request for Informal Opinion

Dear Mr. Thomas:

Thank you for your recent request for an informal opinion. An informal opinion is the opinion of the Commission staff based on the State Ethics Commission's prior published opinions; however, an informal opinion is not binding on the Commission. S.C. Code Ann. §8-13-320 (Supp. 1997). The Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991. (Act Number 248 of 1991; S. C. Code Ann. §§ 2-17-5 et. Seq. and 8-13-100 et. Seq. (Supp. 1997). This opinion is based on the facts as you submitted. Any material deviation from the submitted facts of failure and disclose relevant information will void this opinion. An opinion does not supersede any other statutory or regulatory restrictions which may apply to this situation.

## Issue

In your letter you state the following:

As the Chief Procurement Officer for Construction, I am responsible for conducting quasi-judicial administrative reviews of protests and contract disputes brought pursuant to Article 17 of the South Carolina Consolidated Procurement Code. In discharging that responsibility, the following questions regarding the application of the Ethics Act has arisen. I am writing to request your guidance. I would appreciate an

informal opinion on the following three questions:

1. Is a member of a governing board of a private, nonprofit foundation which is associated with a state educational institution and which is organized to raise funds for the academic, educational, research, or building programs of a college a “public member” as that phrase is used in the State Ethics Act?
2. Is an individual a “public member”, as defined in Section 8-13-100(26), if the individual is appointed to a non-compensated part-time position on a board, commission, or council and that board, commission or council is the governing body of a subdivision of a “governmental entity”, as that term is defined in Section 8-13-100(17)?
3. Do the rules of conduct created by the Ethics, Governmental Accountability, and Campaign Reform Act of 1991, as amended, apply to a “governmental entity”, as that term is defined in Section 8-13-100(17)?

### **Law**

#### **Section 8-13-100 states in part:**

(17) 'Governmental entity' means the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed. 'Governmental entity' also means any charitable organization or foundation, but not an athletic organization or athletic foundation which is associated with a state educational institution and which is organized to raise funds for the academic, educational, research, or building programs of a college or university.

(26) 'Public member' means an individual appointed to a non-compensated part- time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

### **Discussion**

By definition a private, nonprofit foundation associated with a state educational institution which is organized to raise funds for the academic, educational, research, or building programs of a college is a governmental entity. Section 8-13-100(17)(“Governmental entity also means any charitable organization or foundation.....”). In Advisory Opinion SEC AO92-018, the Commission found that members of a governmental entity were public members and governed by the Ethics Reform Act.

### **Conclusion**

Therefore, it is my opinion that members of a state college foundation's governing board are public members if they are appointed to a non-compensated part-time position on the board. The state college foundation is a governmental entity and the Ethics Reform Act's rules of conduct apply to the governmental entity.

Thank you for contacting the State Ethics Commission. If I can be of further assistance in matters within the Commission's jurisdiction, please contact me.

Sincerely,

  
Cathy L. Hazelwood  
Assistant Director and General Counsel

CLH:raw